From: rgr@rgristroph-austin.ath.cx@inetgw
To: Microsoft ATR
Date: 12/23/01 5:54pm
Subject: Microsoft Settlement

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This is an emailed version of a letter also sent by the US Postal Service.

Robert G. Ristroph
11612 Hidden Quail
Austin, TX 78758

Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

Dear Ms. Hesse,

I am writing with regard to the Justice Department's proposed settlement with Microsoft. I believe that this settlement should be scrapped and completely rewritten. Most of the ``restrictions'' placed on Microsoft are already illegal; what few restrictions are left are impossible to enforce and seem designed to produce more legal disputes rather than resolve them; and the proposed enforcement mechanism is a ludicrous embarrassment. In addition to scrapping this proposed settlement, any payment or further employment of the authors should be re-evaluated in light of this idiocy.

I have read the original complaint of United States and the several States at http://www.usdoj.gov/atr/cases/f1700/1763.htm, the proposed settlement at http://www.usdoj.gov/atr/cases/f9400/9495.htm, the Competitive Impact Statement at http://www.usdoj.gov/atr/cases/f9400/9495.htm, as well as numerous other sources including the findings of fact and other documents.

My own injury by Microsoft's illegal actions comes from Microsoft's agreements with OEM's which forced my employer to pay for Windows when buying a new computer from Dell, which we had no plans to use Windows, intending it for Linux. This was supposedly addressed in a prior case to the present one, and yet to this day the same hardware without a Microsoft license has the same cost.

I wish to examine the elements of the proposed agreement item by item, and then propose an outline of an alternative settlement.

A. That Microsoft will not retaliate against OEMs for distributing non-Microsoft software. This is already prohibited by law, given Microsoft's monopoly. The proposed settlement can not consist of Microsoft agreeing to follow the law in the future; like other companies in the United States, it has to follow the law regardless of this settlement.

B. That Microsoft make public it's licensing agreements and offer the same terms to everyone. This is the only part of the proposed settlement makes sense, however, OEMs have shown in the past they were willing to collaborate in Microsoft's illegal activities. Should Microsoft offer an OEM a secrete payback or special deal, the cooperation of the OEM will make this section difficult to enforce.

C. That Microsoft cannot restrict certain OEM software through agreements. This is already illegal, like A.

D. Some meaningless nonsense not worthy of comment or the paper it is printed on.

E. That communications protocols in Microsoft software be publicly available. In light of Microsoft's previous behavior in exploiting secrete calls in it's software, all of it's source code should be available for public examination. The suggestion that only ``communications protocols'' be public is problematic because it leaves open to dispute what consists of a communications protocol. This is foolish given Microsoft's previous

self-serving interpretations of court orders.

F. That Microsoft will not retaliate against software vendors for competing against them. This is already against the law given that Microsoft is a monopoly.

G. That fixed percentage distribution agreements be banned. This is already against the law. The exceptions listed in this paragraph are also against the law, creating the suggestion that the United States will enter into an agreement with Microsoft to allow it to break the law in some cases.

H. That OEMs and users are allowed to configure the Microsoft software they buy. This is vague and confusing because it is difficult to precisely describe what consists of configuring software, and thus impossible to reliably enforce. In a competitive market it would be the natural case, and the proposed settlement should focus on restoring competition.

I. That Microsoft offer licenses to ``intellectual property'' necessary to allow others to exercise ``alternatives provided under this final judgment.'' The reference to alternatives provided to others contradicts the final section of the proposed settlement, which explicitly denies that the final settlement gives any rights to third parties. Even aside from that, this section probably denies behavior already illegal, is riddled with exceptions, vague, and seems designed to produce legal action rather than remedy.

J. A section devoted wholly to exceptions for Microsoft, as if there where not enough already.

The Enforcement Authority:

A. Access to source code is probably one of the best remedies. The exceptions and limitation of this access to a committee are silly.

B. The Technical Committee. It has too few members, it should be composed of Officers of a United States Federal Court in order to make it's requests immediately enforceable through Contempt hearings, and the gag on public statements renders the whole committee useless. The further restriction that the testimony of this muzzled and hobbled committee not be admissible in court is a bit like shooting the deer after it's tied down with it's throat cut.

C. The Microsoft Compliance Officer. This section is nonsense. Other companies manage to obey the law without the use of a special office. If Microsoft needs one they can implement it without a judgment.

D. Voluntary Dispute Resolution. This section seems dedicated to stipulating that various parties send each other letters before seeking court hearings, a common practice. 4(d) guts all enforcement power from the proposed judgment, and suggests that the Attorneys for the Justice Department don't believe in their own system of courts.

Third Party Rights:

This section is in contradiction with other references to the submission of complaints to the Technical Committee and the requirement that Microsoft offer ``intellectual property'' licenses to the third parties so that they can pursue the alternatives guaranteed them in this proposed final judgment.

In summary, this proposed final judgment is a poor sham for a capitulation by the Plaintiffs. It's not even a good surrender, because it's vagueness and self-contradictions guarantee more legal action; if we must capitulate, at least we should save on legal costs. It also completely fails to disguise the capitulation in any way. This is why whoever wrote it should be fired, even if the Justice Department unwisely chooses to fail to enforce the law as applies to Microsoft.

A real final judgment, which might have the chance of remedying the situation, would have to be in some way ``self enforcing.'' By ``self enforcing'' I mean that the remedy by it's nature should preclude further legal wrangling and evasion efforts by Microsoft. Stipulations on Microsoft's future behavior inherently have to be enforced, and thus are not well suited to this case. Furthermore, when the proposed judgment stipulates that behavior already illegal be banned and then suggests exceptions, the Plaintiffs are acquiescing in further law breaking by Microsoft.

An example of a ``self enforcing'' remedy would be denying Microsoft copyright protection. No Technical Committee is required; all that is needed is to reject out of hand cases of copyright enforcement that Microsoft brings. Thus, revoking copyright privileges for some portion of the works that Microsoft used to violate the law might be an appropriate remedy. Or perhaps Microsoft could post substantial bonds against it's future behavior.

Many of the major flaws in this proposed final settlement result from the needless use of vague and disputable terms, when simple and undisputable ones would do.

Replace all references to ``Microsoft Middleware'' ``Windows Operating System Product'' and such with the simple phrases ``products of Microsoft'' and ``products of third parties.'' Avoid even the use the term ``software products,'' as Microsoft would produce hardware required to run their products and then violate the agreement. Be sure the phrase ``products'' is defined to mean anything Microsoft does, including services.

Replace all references to ``ISVs, IHVs, ICDs, OEMs'' and such with the phrase ``any third party.'' Quibbling over which member of the alphabet soup a particular entity fell under is thus eliminated. The final judgment should require no differentiation between the various consumers and companies interacting with Microsoft. This also remedies the fault that the current proposed judgment allows Microsoft to exempt any third party from the benefits of what legal behavior is required by claiming they do not have a viable business plan.

I hope you find these suggestions helpful in writing a real judgment.

Sincerely,

Robert G. Ristroph